UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CHARLES EATON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 96-109-B***
	)	
JOHN J. CALLAHAN,	***)***	
Acting Commissioner of Social Security,[1]	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON PLAINTIFF'S APPLICATION FOR FEES AND EXPENSES

The plaintiff, Charles Eaton, has applied for an award of attorney fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412, in this appeal from a denial of benefits by the Social Security Administration. This court remanded the matter to the defendant for reconsideration in light of a new Social Security Ruling on September 6, 1996. Docket No. 6 (endorsement). After remand, an administrative law judge apparently awarded benefits to the plaintiff, although there is no evidence in the record to support this factual assertion made in the plaintiff's application. In any event, the defendant does not contest the plaintiff's entitlement to such an award. He does dispute several items or elements included in the plaintiff's application. The only issue before the court is the reasonableness of the fee request under the Act. It is the plaintiff's burden to establish that the

[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security John J. Callahan is substituted as the defendant in this matter.

amounts requested are reasonable. *Weinberger v. Great N. Nekoosa Corp.*, 801 F. Supp. 804, 827 (D. Me. 1992).

The plaintiff seeks to recover attorney fees at an hourly rate of $150.00 for 31.0 hours, $480 in fees paid to Dr. Frank Luongo, a clinical psychologist, and $131.41 in expenses.[2] The defendant objects to the requested rate, to $11.41 in claimed expenses, to 1.3 hours of attorney time as being for services performed before the Appeals Council rather than in connection with the proceedings after remand, and to 23.4 of the hours charged as excessive, although no appropriate amount of time is suggested as an alternative. The plaintiff's reply admits only that 0.1 hour of attorney time is not recoverable and does not address the $11.41 in expenses.

I begin with the claimed expenses other than attorney fees. The $120.00 filing fee for the appeal is clearly recoverable. *Weinberger*, 801 F. Supp. at 827 n.65; *Willoughby v. Chater*, 930 F. Supp. 1466, 1470 (D. Utah 1996). However, the $11.41 in charges for postage and copies represents overhead costs which should be borne by the plaintiff. *Kimball v. Shalala*, 826 F. Supp. 573, 577 (D. Me. 1993). Dr. Luongo's fee, to which the defendant did not object, is also recoverable. 28 U.S.C. § 2412(d)(2)(A). The plaintiff may recover $600 in expenses.

The Act sets an hourly rate for awards of attorney fees.

> The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special

[2] The request for award of Dr. Luongo's bill and for 2.8 of the hours of attorney time, spent in preparing the reply to the defendant's response to the application, was made in the form of a motion to amend the fee application. Docket No. 14. The defendant has not objected to this motion, and it is hereby granted.

> factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

28 U.S.C. § 2412(d)(2)(A). The ceiling was raised from $75 per hour to $125 per hour in 1996. Pub. L. No. 104-121, § 232 (1996). The only argument presented by the plaintiff to support his request for reimbursement at an hourly rate of $150 that is cognizable under the Act is that an additional $25 per hour is consistent with increases in the Consumer Price Index since the enactment of the amendment to the Act. However, the plaintiff has submitted nothing in support of his assertion that such increases have taken place. *See, e.g., Kimball*, 826 F. Supp. at 576 (plaintiff submitted consumer price indices for several geographic areas and attorney fees generally; court found cost-of-living adjustment from $75 to $100 per hour to be reasonable in 1993). The plaintiff has the burden of proof on this issue. *Dairy Maid Dairy, Inc. v. United States*, 837 F. Supp. 1370, 1384 (E. D. Va. 1993). In the absence of any evidentiary support, I cannot recommend that the court allow an hourly rate in excess of the statutory maximum.

The plaintiff contends that 1.2 hours of the attorney time expended before the Appeals Council denied review on February 12, 1996, Declaration of James C. Askew (Docket No. 3) ¶ 5(i), is nonetheless compensable here because that work was done "in anticipation of using the material in support of the complaint before this court and in preparation for the hearing before the ALJ on remand." Reply Memorandum (Docket No. 13) at 2. To support this argument the plaintiff refers to his opposition to the defendant's motion to dismiss his initial complaint, Docket No. 4, but there is no reference in that document to Dr. Letsch or Dr. Luongo, the asserted subjects of the 1.2 hours of attorney time. On the record presented, the time spent before the denial of review by the Appeals Council may not be included in an award of attorney fees.

The remaining issue is the defendant's challenge to the majority of the attorney time charged to the plaintiff as excessive. Specifically, the defendant challenges the following items: 13 hours in July 1996 for preparing the plaintiff's eight-page memorandum of law in opposition to the defendant's motion to dismiss; 5.2 hours to review the file and prepare for the hearing after remand; 4.3 hours for travel to and presentation of oral argument in January 1997; 0.4 hours for a telephone conversation with a secretary in the U. S. Attorney's Office in August 1996; and 0.4 hours in May 1997 for review of the decision of the administrative law judge and a telephone conversation with the plaintiff. Defendant's Partial Opposition to Plaintiff's Motion for Award of Attorney's Fees Pursuant to the Equal Access to Justice Act ("Defendant's Partial Opposition") (Docket No. 12) at 4-5.

The defendant's motion to dismiss the plaintiff's appeal from the defendant's denial of his claim for benefits was the central event in the proceedings before this court. The plaintiff's response concerning the time spent in responding to the motion, that "[p]age length is simply not a reasonable indicator of anything," Reply Memorandum at 2-3, is incorrect. The First Circuit has included page length as one of the factors to be considered in evaluating an argument that the time charged in a claim for an award of attorney fees is excessive. *E.g.*, *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 954 (1st Cir. 1984). However, the defendant offers no other reason why the time spent by counsel in connection with the motion is excessive. After reviewing the opposition memorandum filed by the plaintiff and his counsel's representation of the specific activities involved in producing that memorandum, I conclude that 10 hours is a reasonable amount of time for which attorney fees may be awarded in connection with the motion to dismiss.

The 5.2 hours spent in review of the file in preparation for the hearing before the

administrative law judge does appear to be excessive, particularly given the facts that counsel had spent some 1.2 hours in reviewing the file earlier, Reply Memorandum at 4, and that the file, while characterized by the plaintiff as "six inches thick and unindexed," *id.*, apparently consisted of the Declaration of James C. Askew and the attachments to that document, all of which are present in the court's file, Docket No. 3, and is not extensive. Even allowing for the addition to the file of the report of Dr. Luongo obtained by the plaintiff's counsel for the hearing, four hours for review and preparation would be a more reasonable time. *See generally Grendel's Den*, 749 F.2d at 952-55.

The defendant also challenges a claim for 4.3 hours which it characterizes as "travel to and presentation of oral argument." Defendant's Partial Opposition at 4. This is a mischaracterization of the entry on the invoice, which refers to the hearing before the administrative law judge, not merely an oral argument. Invoice attached to Application (Docket No. 11) at [1]. No supporting material is provided, so it is impossible to know how long the hearing actually lasted, where it was held, or how much of this time was actually spent in travel by the plaintiff's counsel. Because the 4.3 hours includes the hearing itself and a consultation with the plaintiff, it is not possible that the hearing was held in Bangor; it is unlikely that the hearing was held in Portland, where counsel's office is located, because no charge for travel time would be necessary. Therefore, I conclude that the hearing was most likely held in Augusta, involving an approximate total of two and one-half hours driving time. Travel time to and from oral argument should not be compensated at the base hourly rate for attorney fees; half the base rate for this time will be allowed. *Cooper v. United States R.R. Retirement Bd.*, 24 F.3d 1414, 1417 (D. C. Cir. 1994).

Next, the defendant challenges an entry of 0.4 hours on August 13, 1996 which it characterizes as a telephone call with a secretary at the United States Attorney's office. The actual

entry also includes a review of the file and a second telephone call. Invoice attached to Application at [3]. The plaintiff does not respond to this argument in his reply memorandum. Based upon the information included in the invoice, 0.2 hours is a reasonable time to complete the recorded activities.

Finally, the defendant asserts that 0.4 hours billed on May 7, 1997 for review of the decision of the administrative law judge and a telephone conversation with the plaintiff regarding the decision is excessive. Again, submission of a copy of the decision by either party would have been helpful to the court in its review on this point. However, that amount of time does not appear on its face to be excessive for the activities involved.

In summary, I conclude that the plaintiff is entitled to an award of attorney fees at the rate of $125 per hour for a total of 22.8 hours, $62.50 for a total of 2.5 hours, and expenses in the amount of $600.

For the foregoing reasons, I recommend that the plaintiff's application for an award of fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412, be **GRANTED** in the amount of $ 3,606.25.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 1st day of August, 1997.

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David M. Cohen
United States Magistrate Judge